NORTHERN TERRITORY LAW REFORM COMMITTEE:

REPORT ON THE REVIEW OF THE JURIES ACT

Report No.37

March 2013

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE

The Hon Austin Asche AC QC Ms Hilary Hannam CSM Ms Peter Shoyer Ms Megan Lawton Ms Peggy Cheong	Mr Nikolai Christrup Superintendent Sean Parnell Professor Les McCrimmon Mr Jared Sharp Mr Ron Levy

MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE JURIES ACT SUB-COMMITTEE

The Hon Austin Asche AC QC Superintendent Sean Parnell Mr Russell Goldflam	The Hon Dean Mildren Professor Les McCrimmon

TABLE OF CONTENTS

TERMS OF REFERENCE

On 13 April 2011, the former Attorney-General the Honourable Delia Lawrie MLA provided the following Terms of Reference to the Northern Territory Law Reform Committee (NTLRC):

"The terms of reference to the inquiry are as follows:

The Northern Territory Law Reform Committee (NTLRC) is asked to undertake a comprehensive review of the *Juries Act*.

In particular, the review should consider:

- the relationship between the Sheriff and SAFE NT and the process or carrying out checks to exclude those jurors who are not qualified; and
- mechanisms to ensure that the rate of attendance for jury duty is sufficient to satisfy the requirements of the courts".

SUBCOMMITTEE

The usual practice of the NTLRC when a reference is given is to appoint a small sub-committee to draft a preliminary report to be submitted to all members of the NTLRC and in the light of comments and submissions received from all members, draft a final report.

The members of the sub-committee are:

- Honourable Austin Asche AC QC, Chair;
- Honourable Dean Mildren, former Justice of the Supreme Court of the Northern Territory;
- Professor Les McCrimmon, Northern Territory Bar and Charles Darwin University;
- Superintendent Sean Parnell, Police Prosecutions Division of the Northern Territory Police; and
- Mr Russell Goldflam, Barrister and Solicitor and Director of the NT Legal Aid Commission.

The sub-committee records its gratitude for the assistance and co-operation of the Sherriff Peter Wilson.

PART I

COMPREHENSIVE REVIEW OF THE JURIES ACT

JURIES ACT

PART I – COMPREHENSIVE REVIEW OF THE JURIES ACT

The first term of the Reference is that:

> "The NTLRC is asked to undertake a comprehensive review of the *Juries Act*".

Relevant to this term is the decision of the Full Court of the Supreme Court of the Northern Territory in R v Woods & Williams (2010) 240 FLR 4.

In that case the Full Court comprehensively surveyed the *Juries Act*, made certain specific rulings, and then advised:

> *"It is probably a good time for the whole of the Act to be reviewed and we suggest that a reference should be made by the Attorney-General to the Law Reform Committee".*

A. SPECIFIC RULINGS OF THE FULL COURT

1. Precept must be issued by Chief Justice

The Full Court found that in the case before it (ie Woods) s.24 of the *Juries Act*, had not been followed, in that no precept had been issued by the Chief Justice as the occasion demanded.

S24 is headed "Jury Precepts" and provides:

> *"From time to time and as often as the occasion demands, the Chief Justice shall issue, under his hand and seal, a precept directed to the Sheriff requiring him to summon jurors before the Court at Darwin or Alice Springs, as the case requires".*

The Full Court ruled:

"In our opinion s.24 plainly requires a precept to be issued by the Chief Justice before the process of random selection takes place".

Their Honours concluded that failure to do this was "a material departure from the provisions of the Act".

2. Terms of Precept must be followed

S.25 is headed "Terms of Precept" and provides:

"A jury precept shall be in accordance with the form in Schedule 3 and shall specify the number of jurors required and the time when and place where the attendance of the jurors is required, and shall be issued and delivered to the Sheriff at least 14 days before the time so specified".

In Woods the Full Court found that "350 persons were selected randomly, whereas the precept required only 291 persons".

Their Honours ruled:

"The precept is not a mere formality. It is the instrument which authorises the Sheriff to act and which determines how many jurors are to be selected. Without it, the Sheriff has no authority".

3. No recommendations needed

These are plain and unambiguous instructions. They will necessarily be noted and obeyed. It would be otiose, rash and temerarious in this Committee to suggest that the rulings of the highest court in the Territory should be bolstered by recommendations.

B. RECOMMENDATIONS

We turn therefore to aspects of the *Juries Act* which the Full Court considered should be examined; and add to that such other matters as this Committee, under the broad powers of enquiry requested of it, might consider appropriate for re-assessment.

1. Sheriff – Referral to independent body

S.27 of the *Juries Act* provides:

> *"Jurors to be chosen by random selection by computer.*
>
> *When a jury precept is delivered to the Sheriff, the Sheriff shall choose the persons to be summoned from those whose names appear in the jury list for Darwin or the jury list for Alice Springs in accordance with random selection by computer in the prescribed manner".*

The Full Court made this comments:

> *"Mr Tippett QC's next submission was that the process of sending the panel, selected randomly under s.27, to the SAFE NT was not authorised by the Act. In all other jurisdictions, there is statutory authority enabling the Sheriff to send the names of the jurors selected to the police or to the prosecution or elsewhere to seek assistance as to whether any of the jurors selected have disqualifying convictions. Until 2010, New South Wales was the only jurisdiction, other than the Northern Territory, which made no such provision.*
>
> *As we understood the first limb of Mr Tippett QC's submission, the facts show that the Sheriff made no independent enquiry of his own (except as to checking for exempt exceptions) and relied solely on the checks made by SAFE NT, which simply struck the name of each such person from the list. In the absence of statutory authority, we are unable to see how this was authorised by the Act".*

Later in the judgment the Full Court said:

> *"We think also the fact that the checks were carried out without any statutory authority by an organisation connected with the police is objectionable on the basis that the police are interested in the prosecution of offenders. It seems to us that in these circumstances there is a ground for challenge for favour on the basis that the Sheriff's actions are not necessarily consistent with indifference and may be suspected, having employed those connected with the prosecution to strike off names of those selected without either statutory authority or enquiry".*

These comments underline the fact that the NT is now the only jurisdiction in Australia where provision is not made that the Sheriff send the randomly selected jury list to an appropriate agency to check for disqualification. Clearly this calls for amendment to s.27.

The comments quoted above also cast doubt on the use of SAFE NT for making the checks required by s.10 on the basis that it is "not necessarily consistent with indifference".

The alternative suggested by this Committee is to obtain such information from the national Criminal History data base agency CRIMTRAC run by the Federal Government.

The amendment proposed to s.27 need only refer to a "prescribed agency" leaving it to the Regulations to define this agency as CRIMTRAC or such other agency as might be approved.

It should however, remain the responsibility of the Sheriff to determine whether such persons are not qualified pursuant to s.10.

Recommendation:

(a)Amend s.27 by adding at the end of the section, as now appearing, the following sentence:

"The Sheriff shall then send the list of those persons so chosen to a prescribed agency to determine whether any of such persons are not qualified pursuant to s.10 and, if any such appear, omit the names of such persons from the jury list".

(b)Prescribed agency shall be as prescribed in the Regulations.

2. <u>Sheriff – Power to Question</u>

S.27 A reads:

"Sheriff's power to question

(1)A Deputy Sheriff shall not exercise any power under this section unless he has been expressly authorised by a Judge or the Master to exercise that power.

(2) The Sheriff and each Deputy Sheriff shall, in the exercise of any power under this section, comply with such directions as are given from time to time by the Chief Justice.

(3) The Sheriff and a Deputy Sheriff may, at any time before the juror's name is called in accordance with section 37 or 39, question any juror chosen under section 27 to ascertain whether that juror is able to read, write and speak the English language.

(4) If the Sheriff or Deputy Sheriff is not satisfied that a juror referred to in subsection (3) is able to read, write and speak the English language, he shall thereupon report the fact to a Judge or the Master".

The Sheriff's or Deputy Sheriff's powers as to questioning are confined to questioning a juror as to his/her knowledge of the English language and, if not

satisfied that the juror has an appropriate knowledge of the English language, reporting that fact to a Judge or Master. Some States have confined the enquiry to language skills, as does the NT. But other States have widened the enquiry. See Appendix A.

Conclusion

As can be seen by Appendix A, States are equally divided: WA, SA and Tasmania confining incapacity to incapacity of language as in the NT. NSW, Victoria and Tasmania take a broader view covering any circumstances which might render a juror unfit for service as a juror. Such examples may be, erratic or disturbing behaviour, statements by the juror indicating a fixed preference for prosecution or defence, or statements to the effect that a particular race or group of peoples are inherently untrustworthy; and so on.

It seems therefore, appropriate, and for the proper functioning of the jury, that the Sheriff or Deputy Sheriff be given the power to report to the Judge or Master, not only the perceived language incapacity of a juror, but any other aspects of a juror's statements or behaviour which may cause the Sheriff or Deputy Sheriff to be concerned that the juror may be unfit to serve as such. The final decision should be left to the Judge or Master.

Recommendation

That s.27A of the NT Juries Act be amended in the following manner:

> *That in subsections (3) and (4) of s.27A, in lieu of the words "is able to read, write and speak the English language", the words "able to understand and communicate in the English language". And in subsection (4) in lieu of the words "able to read, write and speak the English language" there be inserted the words "able to understand and communicate in the English language, or if for any other reason the Sheriff or Deputy Sheriff is concerned that a juror may be unfit to properly perform service as a juror".*

(s.15 then leaves, as before, the ultimate decision to the Judge or Master).

3. Challenges and Stand Asides

By s.43 of the Juries Act the Crown has the right to "stand aside" up to 6 jurors.

By s.44 both the Crown and the Defence are given the right to challenge peremptorily 6 jurors or, in the case of a "capital offence", 12. Thus the Crown has the right, in effect, to 6 more challenges without cause than the Defence. There is no rational basis for this, and it does give an appearance of some sort of superior status in the Crown which might, in turn, produce at least an appearance of unfairness. Both Crown and Defence should be limited to 6 peremptory challenges in the case of each accused or 12 in the case of an offence the punishment of which is imprisonment for life, and then be required to show cause if they wish to challenge further.

In the case of more than one accused the Crown should be limited to a total of 12 peremptory challenges, while every accused remains individually entitled to 6 peremptory challenges. In the case of a 'capital offence' each accused has the right to 12 peremptory challenges but in the case of more than 1 accused the Crown should be limited to a maximum of 24 peremptory challenges overall.

S.44(1)(a) the expression "capital offence" is not now employed in the Criminal Code which uses the term "imprisonment for life". See s.157 of the Code.

Recommendation

(a) That s.43 of the NT *Juries Act* be repealed.

(b) That, in s.44(1)(a) of the *Juries Act*, the expression "capital offence" be deleted and the words "an offence for which the punishment is mandatory imprisonment for life" be substituted.

(c) At the end of s.44(1) there be added these words "but pursuant to section 44(1)(b) if there is more than 1 accused, the Crown is limited to 12 peremptory challenges overall, while each accused remains entitled to 6 individual peremptory challenges. Similarly to section 44(1)(a) in a cases where there are more than 1 accused, the Crown is limited to a total of 24 peremptory challenges overall, while each accused remains entitled individually to 12 peremptory challenges.

4. Trial of Challenge for cause

The NT Criminal Code provides:

"356 Ascertainment of facts as to challenge

(1) If at any time it becomes necessary to ascertain the truth of any matter alleged as cause for challenge the fact shall be tried by the jurors who have already taken the oath as jurors if more than one or, if one juror only has taken the oath as a juror, by such juror together with some indifferent person chosen by the court from the panel of jurors or, if no juror has taken the oath as a juror, by 2 indifferent persons chosen by the court from such panel.

(2) The persons so appointed are to take an oath to try the cause for challenge and their decision on the fact is final and conclusive.

(3) If the persons so appointed cannot agree, the court may discharge them from giving a decision and may appoint 2 other persons to try the fact to be chosen as in the case where no juror has taken the oath as juror".

This rather complicated procedure has been preserved down the ages probably because it is so rarely used that its difficulties have not become transparent. How, for instance, are two persons, either already empanelled or selected as "indifferent persons" from the panel, to "try" the issue? Inquisitorially or, as a jury? What role does the judge play, if any?

The obvious and simple solution to such difficulties is to leave any question of challenge for cause to be determined by the trial judge.

At the same time, it would be appropriate to strengthen the Judge's control of proceedings where the exercise of peremptory challenges might lead to an unfairness in the composition of the jury. An amendment similar to s.47A of the Jury Act NSW should be inserted into the NT *Juries Act*.

Recommendation

That s.356 of the NT Criminal Code be repealed and, in lieu thereof the following section be enacted:

> *"356 Ascertainment of facts as to challenge*
>
> *If, at any time it becomes necessary to ascertain the truth of any matter alleged as cause for challenge, the fact shall be tried by the trial judge who may then on the facts as found by him, and upon hearing such submissions as may be put to him by prosecution or defence, determine whether the person challenged should or should not be impanelled and no appeal shall lie from the Judges' decision on this matter".*

Recommendation

That to s.356 of the NT Criminal Code there be added the following section:

> *"356A*
>
> *The judge presiding at the trial of any criminal proceedings may discharge the jury that has been selected if, in the opinion of that judge, the exercise of the rights to make peremptory challenges has resulted in a jury whose composition is such that the trial might be or might appear to be unfair".*

5. Service

Sections 29 and 30 of the NT *Juries Act* provide:

s.29 Summons to jurors

The Sheriff shall cause to be served upon each juror chosen in pursuance of section 27 a summons in a form approved by the Sheriff.

s.30 Service of Summons

A summons to a juror shall be served on the juror:

(a) By delivering it to him personally as soon as practicable and not less than 7 clear days before the time specified in the summons for his attendance; or

(b) By forwarding the summons by ordinary prepaid post to his address, as it appears on the annual jury list, so that the summons would, in the ordinary course of post, be delivered to that address not less than 7 clear days before the time specified in the summons for his attendance.

Some concern has been raised about the practice of posting summonses to jurors whose address on the jury list was a town camp.

The Full Court in Wood did not uphold the objection to this form of service other than to comment:

> *"If the Sheriff does become aware that service by post to a particular address will be ineffective, it would be wise for him to put beyond doubt that he has complied with s.29".*

In other words, the Full Court relies on the discretion of the Sheriff to make all practicable efforts for service and this Committee has no doubt that the Sheriff does that and will continue to do so.

Some assistance to the Sheriff is becoming available by provision made by the Alice Springs Town Council for better street numbering and more precise identification of locations; but in the case of town camps, the best that can be done is to urge the representatives of such camps to make reasonable endeavours to see that the particular juror named in the summons is contacted.

However, some further methods of service are now available and may, in appropriate cases, be considered and acted upon by the Sheriff, such as email, SMS messaging and messaging to social media sites such as Facebook.

In every case, the aim must be to choose such form of communication as might be best to bring the summons to the notice of the recipient.

Recommendation

Amend subsection (b) of s.30 to include at the end of the subsection, the word "or"'

Add subsection (c):

(c) If it appears to the Sheriff that, in the case of any particular juror, some method of service, other than as set out in sub-section (a) or (b), may be more effective in bringing the summons to the notice of the juror, the Sheriff may select such other means of service as are provided for in the Regulations.

(Regulations may then refer to email, etc)

Regulations may also provide that the Sheriff may confer with an Aboriginal Legal Service as to appropriate methods of communicating with Aboriginal persons, unfamiliar with jury procedure.

6. <u>'Catchment Pool' of Jurors</u>

By s.9 of the *Juries Act*, and subject to s.10 ("persons not qualified"), a person whose name is on the roll is qualified to serve as a juror and (if not "exempt") is liable to serve as a juror. The word "roll" is defined as "a roll within the meaning of the *Electoral Act*".

Is the Electoral Roll sufficiently inclusive?

The use of the Electoral Roll to obtain a list of suitable jurors should be looked at as there are large sections of society potentially excluded who may not be registered for jury service. Aboriginal persons and migrants in particular. NT

driver's licences and/or Centrelink records may also yield useful data for developing the rolls. It may also be timely to review how the Electoral Commission establishes its own roll, given that voting is compulsory in the Commonwealth, but registering to go on the roll is not.

The latest figures for the NT (2011) indicate there are 119,608 persons on the Electoral Roll in the NT. (2010/2011 Annual Report). By comparison there are 137,261 persons with Northern Territory driver's licences. An extra cohort of 17,693, out of the total NT population of 230,000 is a substantial number. The NT Electoral Roll allows provisional enrolments from age 17 years and soon to be 16 years in the NT, so that should account for the 17 year olds with licences. NSW has an innovative system whereby the NSW Electoral Commissioner automatically enrols people on the State Electoral Roll based on their possession of a NSW driver's licence. It's called SMART roll, and given the large discrepancy between driver's licences and the Electoral Roll here in the NT, this may be a useful way to address this and increase Indigenous representation on the Roll and hence the pool of potential jurors. Basically the Electoral Commission taps into the electronic database of driver's licences.

NAAJA also suggests that the Catchment Pool could be expanded further by including names taken from the Aboriginal Health Service and if practicable ABS Census databases. This Committee agrees.

The Catchment Pool of the Jury List should also be expanded to include names taken from the Aboriginal Health Services and if practicable the ABS Census databases.

Recommendation

That the 'Catchment Pool' of the Jury List be expanded by adding to the Electoral Roll names taken from Centrelink and Motor Vehicle Registry databases, and that, in this process it would be useful to refer to the procedure employed by the NSW Electoral Commission.

7. Review of Jury Districts

It is understood that the formation of jury districts outside Darwin and Alice Springs is presently impracticable since the Supreme Court sits only in Darwin and Alice Springs (although, occasionally in Katherine).

However, the Jury Districts of Darwin and Alice Springs could be widened to include additional Indigenous communities within reasonable reach of these two cities. To take one example, the community of Santa Teresa is sufficiently close to Alice Springs to warrant inclusion. This may increase the representation of Aboriginal citizens on juries, particularly in Alice Springs.

Since it would frequently be a problem for representatives of such communities to attend the sittings, particularly on a daily basis and, if public transport is not reasonably available, the Sheriff should, if necessary, make arrangements to assist them to attend court and should meet the costs of those arrangements. A similar recommendation appears in paragraph 11-2 of QLRC Report "A Review of Jury Selection" Feb 2011. The extra expenses would be justified by the greater representation of citizens within the district, and therefore closer to the ideal of impartiality. Nor should these arrangements be restricted to Indigenous communities, but to any juror similarly disadvantaged.

Recommendation

That the Jury Districts for Darwin and Alice Springs be widened so as far as practicable, to allow further representation from Indigenous communities.

Recommendation

If public or private transport is not reasonably available or cannot reasonably be used, the Sheriff should, if necessary, make arrangements to assist people to attend court when summoned for jury service and should meet the costs of those arrangements.

Recommendation

If a person is selected to serve as a juror in a case which requires more than one day's hearing, and if it is impracticable for such juror to travel daily from his home, the Sheriff should arrange suitable accommodation at no expense to the juror, for the juror in the city where the trial is being held.

8. NT Juries Act to be comprehensive

The NT *Juries Act* by its very title implies that all relevant material relating to the composition, selection and functioning of juries will be contained within it.

It is an anomaly therefore, that the subject of challenges to jurors, either peremptory or for cause, is contained in the Criminal Code rather than the *Juries Act*.

While experienced practitioners will be aware of this undisclosed foray into neighbouring statutory territory, others, both lawyers and non-lawyers, reading an Act purporting to be comprehensive, may not unreasonably take the view that the matter of challenges is governed by s.42 of the *Juries Act*, which, in fact bears the title "Challenges", and the section itself appears under the heading "Right of Challenge". Regrettably, the section itself is outdated, misleading and guaranteed only to confuse the innocent.

> *"Part VIII Challenge*
>
> *42 Right of challenge*
>
> *Subject to the provisions of this Act, challenge to the array and to the polls may be made and allowed for such and the like cause, in such and the like form and manner and under and subject to the like laws, rules and regulations in every respect as by law was or were established, used and practised in like cases in the Northern Territory immediately before the commencement of this Act".*

Any relevance of this section has long been superseded by the specific provisions contained in the Criminal Code; and these specific provisions should have their rightful domicile in the NT Juries Act.

The irony of the situation is compounded, in that, these specific provisions in the Criminal Code are introduced by a section which speaks with a forked tongue.

> *"351 Juries*
>
> *The law respecting the qualifications of jurors and the summoning of jurors to attend for the trial of persons charged with offences and the challenges allowed to such persons is set forth in the laws relating to juries and jurors".*

Having carefully informed the reader that the law relating to challenges "is set forth in the laws relating to juries and jurors", the sections immediately following proceed to do precisely the opposite and insert those laws into the Criminal Code.

It is only necessary to give the headings of the sections following s.351 of the Criminal Code to illuminate the contradictions.

s.351A	Details of Jury Panel to be given to accused
s.352	Accused person to be informed of his right of challenge
s.353	Challenge to array
s.354	Challenges to individual jurors for cause
s.356	Ascertainment of facts as to challenge
(s.357	repealed by Act No. 11 2002 s.5)
s.358	Jurors to take oath and be informed of charge
s.359	Discharge of juror by court

Recommendation

That sections 351A, 352, 353, 354, 356, 358 and 359 of the NT Criminal Code be repealed and that the NT *Juries Act* be amended by the insertion of these sections into the NT *Juries Act* as sections 42A-G respectively.

9. Disqualification

S.10 of the Juries Act is headed "Persons not Qualified" and sets out various conditions which debar a person from jury service by reason of prior convictions. The section disqualifies from jury service any person sentenced to a term of imprisonment who has not completed that term, whether still in prison or released conditionally, or on a suspended sentence and until that term has expired.

This Committee sees no reason to interfere with these particular provisions. A person sentenced to imprisonment, even if released on conditions, or if the sentence has been suspended wholly or in part, has clearly enough so threatened or disrupted the society to which he owes allegiance as to warrant that society refusing him the privilege and duty of judging his fellow citizens while the terms of his sentence remain in force.

But s.10 also recognises that, providing that the sentence imposed has not been one of life imprisonment, and providing that such person has properly paid his debt to society by completing the sentence and fulfilling any conditions imposed, then such person at some future time should have restored to him the rights and privileges of a citizen. See s.10(1).

s.10(3)(1) provides that a person sentenced to a term of imprisonment (other than for "capital" offence), and has not completed the sentence (which includes conditional terms or a suspended term) is not qualified to serve as a juror. By s.10(3)(a)(ii), if he has completed the sentence (including the conditional or suspended provisions) shall not be qualified to serve as a juror until "a period of less than 7 years has elapsed" since he completed the service".

It is this Committee's view that, particularly with Aboriginal defendants, this term may be unnecessarily long if a person so sentenced has not re-offended after the offence for which he was sentenced. Although any lessening of the 7 year prohibition should necessarily apply to non-aboriginals as well, the present situation serves to deprive Aboriginals from acting as jurors beyond what is presently recognised as appropriate in the present legislation, and thereby unnecessarily lowering the pool of potential jurors.

In particular, it would seem over-lengthy if the conviction was a summary conviction, that is, recognised by the prosecution as not serious enough to require a prosecution on indictment before a jury.

In cases of conviction on indictment, and without further offence, this Committee considers that a term of 5 years before becoming eligible as a juror would be sufficient.

These suggestions are also supported by the submissions of the NAAJA to this Reference. The NAAJA also refers to the Report of the Queensland Law Reform Commission (No.68 OF 2011) "a Review of Jury Selection".

At pp.112-113 of that Report, these comments appear in relation to the Queensland Jury Act:

The (Queensland) Commission's View

6.147 To maintain public confidence in the jury system, juries need to be, and be seen to be, impartial. For that reason, the Commission is of the view that it is necessary to exclude certain people from jury service on the basis of their criminal history.

6.148 However, in recognition of the principles of offender rehabilitation and non-discrimination, and the desirability of maintaining representative juries, the grounds on which a person is excluded from jury service by reference to the person's previous criminal history should not be unduly broad; further, the grounds should differentiate between serious and less serious offending. The breadth of the existing provisions is such that many people who have engaged in even relatively minor criminal behaviour, and many Indigenous people who are over-represented as criminal defendants, will be permanently excluded from the jury pool.

The NAAJA's submissions on this issue are as follows:

"Under the Act, if a person has been sentenced to a term of imprisonment for an offence (other than a capital offence), and a period of less than 7 years has elapsed since they completed the sentence, that person is disqualified from serving as a juror in NT.[18]

In circumstances where a high percentage of the Indigenous population has served time in incarceration, Indigenous people are more likely than other members of the population to be disqualified under this provision.

***NAAJA recommends narrowing the exclusion set out in s.10(3)(a)(ii)**. Specifically, NAAJA recommends not excluding people who were convicted summarily and have served their sentence. A similar recommendation was made by the Queensland Law Reform Commission in 2011.*[21]

Where a person has been triedon indictment and sentenced to imprisonment, NAAJA recommends they be disqualified from jury service for a period of 5 years after completion of their sentence.[11]

This Committee agrees with the above views and makes the appropriate Recommendation.

<u>Recommendation</u> that s.10(3)(a)&(b) be amended as follows:

(3) A person who:

(a) has been convicted summarily but not sentenced to a term of imprisonment and has not completed the terms of any penalty imposed and until such penalty (including such conditional terms or such period of supervision of such penalty as may be imposed) has been completed, or;

(b) has been sentenced to a term of imprisonment (whether within the Territory, in a State or another Territory or in a prescribed country) for a period of not more than 20 years and:

(i) has not completed the sentence; or

(ii) has completed the sentence and:

(a) where the sentence imposed was not less than 5 years, a period of less than 7 years has elapsed since he completed the sentence; or

(b) in any other case, a period of less than 3 years has elapsed since he completed the sentence

(c) is a person in respect of whom an order under section 15 of the *Adult Guardianship Act* is in force;

(d) is of unsound mind or is:

(i) in a hospital or an approved treatment facility; or

(ii) undergoing treatment,

under the *Mental Health and Related Services Act*; or

(e) is a protected person within the meaning of the *Aged and Infirm Persons' Property Act*,

is not qualified to serve as a juror.

PREAMBLE

The NT *Juries Act* enshrines a constitutional safeguard properly regarded as a basic foundation of the democratic society accepted by Australian citizens. It may be appropriate therefore to emphasise the ideals embodies in the Act by means of a Preamble. Although such ideals apply to all members of the community, they may have a particular significance for a member of the Aboriginal community.

Recommendation

That the *Juries Act* NT include a Preamble emphasising:

(a) The importance of jurors as representing the community;
(b) The aim to spread the obligation of jury service equitably among the community;
(c) To permit the timely development of new technologies for the more equitable selection of persons for jury service.

SELECTION OF JURY – POSSIBLE FLAWS

If, after the selection of a jury and the commencement of the trial, it is found that a juror is ineligible, or for some other reason needs to be discharged, there may be some doubt as to whether the whole trial is flawed to the extent that it cannot continue.

To resolve any such doubts, the Judge should be given express discretion either to order that the trial continue after discharge of a juror or to abort the trial if he considers that the circumstances are such that, in the interests of justice, the trial should not continue.

Recommendation

The *Juries Act* (NT) should be amended to provide an express power to discharge a juror without discharging the whole jury in circumstance where the court is satisfied that:

(a) The juror:

(i) Is either disqualified or exempt from jury service;

(ii) Is, by reason of illness, unable to continue to serve as a juror;

(iii) Displays a lack of impartiality;

(iv) Refuses to take part in deliberations;

(v) Has engaged in misconduct in relation to the trial; or

(vi) Should not be required to continue to serve for any other reason that the judge considers sufficient; and

(b) The interests of justice do not require that the whole jury be discharged.

and to order that the trial continue with the remaining jurors, so long as the number of remaining jurors meet the requirements of the *Juries Act* (NT) s.37 (criminal cases), and s.39 (civil cases).

JURY SERVICE – RATES OF PAYMENT

It is quite normal for many jurors to complain about the fees they receive for jury service, especially if they are self employed and the trial takes longer than expected. This Committee considers such complaints generally reasonable, but realises that it would be impractical in an ever-varying economic climate to recommend specific amounts. Professor McCrimmon, one of the members of the Sub-committee has prepared a detailed study of Fees and Fares for jury payments.

It has been noted that the fees and fares paid to jurors "have a direct and significant relationship to the willingness of some people to serve as jurors". [1] In the Northern Territory, fees paid to jurors for jury service are set out in the *Juries Regulations* (NT) Reg 6 (civil trial) and Reg 8 (criminal trial). The respective provisions provide:

<u>Fee for Civil Trial</u>

[1] NSW Law Reform Commission, *Jury Selection* (Report 117,2007) at 212. See also Australian Institute of Criminology, *Practices, policies and procedures that influence juror satisfaction in Australia,* Research and Public Policy Series No 87 (2008) at 87-93; Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) at [12.1].

6 (1) For section 8(1) of the Act, the prescribed fee is:

(a) If the trial lasts 9 days or less - $240 for each day of the trial; or

(b) If the trial lasts 10 days or more - $480 for each day of the trial.

(2) For section 8(2) of the Act, the party liable to the fee:

(a) must, before the court sits on the first day of the trial, submit a written estimate of the number of days the trial will last and pay an amount equal to the prescribed fee for a trial of the length estimated; and

(b) if the estimate is exceeded – must, before the trial resumes on the first day on which the estimate is exceeded, submit a revised estimate and pay an amount equal to the prescribed fee for a trial of the length estimates less the amount already paid; and

(c) if the revised estimate is exceeded – must, before the trial resumes on the first day on which the revised estimate is exceeded, submit a further revised estimate and pay an amount equal to the prescribed fee for a trial of the length estimated less the amount already paid; and

(d) must continue as indicated above if the trial lasts longer than the period estimates in the last estimate submitted under this regulation.

(3) If a court sits with the jury for part of a day, the day is counted as a whole day for subregulations (1) and (2).

(4) If it appears, at the end of a trial, that the amount paid under subregulation (2) exceeds the fee actually payable under subregulation (1), the amount overpaid must be refunded to the party.

Fees for Criminal Trial

(8) (1) For section 60 of the Act, an employee who continues to receive ordinary pay and who has no deductions from other leave entitlements

while on leave to attend for jury service is taken to have received payment for attendance.

Example for subregulation (1)

If, under by-law 20 of the Public Sector Employment and Management By-laws, the Chief Executive Officer releases an employee for jury service without deduction from pay or leave credits, that employee is taken to have received payment.

(2) However, if the Sheriff or Deputy Sheriff is satisfied that subsection (1) does not apply, the payment a juror or talesman is entitled to receive for attendance is:

(a) for each day, or part day, of service as a juror for a trial:

(i) $60 – if the trial lasts 9 days or less; or

(ii) $120 – if the trial lasts 10 days or more; and

(c) $20 for each day, or part day, the person attends for service, but does not serve as a juror for a trial.

(3) If it is proved to the satisfaction of the Sheriff that as a result of attendance on a day, or part day, the juror or talesman has suffered financial loss, the juror or talesman is entitled to receive an additional amount for that attendance equal to the lesser of:

(a) the amount by which the loss exceeds the amount payable under subregulation (2); and

(b) either:

(i) $30 – if the person serves as a juror for a trial; or

(ii) $20 – in any other case.

Fares Paid Are Governed by section 9

9(1) A person whose residence is more than one kilometre from the relevant Supreme Court is entitled to be paid for each journey made between the

person's residence and the Court to attend the Court as a juror or talesman or to return home afterwards.

(2) The fare payable under this regulation for a journey is:

(a) if public transport is available – amount payable by the juror or talesman for using public transport for the journey; or

(b) in any case – an amount calculated at 27 cents for each kilometre of the journey, measured along the shortest practicable road route.

While no comment was made by stakeholders regarding the fees paid to jurors in a civil case, likely due to the fact that juries are seldom used in civil trials in the Northern Territory, it was suggested during the course of the inquiry that the fees paid to jurors in a criminal trial are too low. The fees and fares paid to jurors in both civil and criminal trials were last reviewed in 2007.[2]

Workplace Relations Legislation

When setting the fees payable to jurors, a distinction needs to be made between various categories of employment. For example, a person who is in permanent full-time employment is in a different category to those who are self-employed, unemployed or employed under a casual contract. For employees falling within the category of a 'national system employee'[3] under the *Fair Work Act 2009* (Cth), s 111 provides, in effect, that:

- An employee absent from his or her employment for a period because of jury service must be paid at the employee's base rate of pay for the first 10 days of absence;
- An employer can require the employee to provide the employer with evidence that the employee has taken all necessary steps to obtain the jury service pay to which the employee is entitled under the *Juries Act* (NT); and

[2] Juries Amendment Regulations 2007 (NO 27 of 2007)
[3] 'National systems employee' is defined in the *Fair Work Act 2009 (Cth), s 14*

- If the employee has been paid jury service pay, the amount payable by the employer to the employee is reduced by the amount of jury service pay received by the employee.[4]

Excluded from the protection afforded by the *Fair Work Act* in this context are those employees on casual contracts, [5] those that are self-employed, and, of course, the unemployed.

In addition to workplace relations legislation, some awards make provision for the payment of employees while on jury service. For example, the Manufacturing and Associated Industries and Occupations Award 2010 provides for a 'top up' so that full-time employees are reimbursed by his or her employer for the difference between the jury service pay and the employers ordinary hours of work.[6] Unlike the *Fair Work Act*, the award has no limit on the number of days the employee must be renumerated. Further, for part-time employees who are required to attend jury service on days they normally work, the award also stipulates that they must be paid as set out above.[7]

Comparison with Other Indicators

As of 1 July 2012, the minimum wage in Australia is $15.96 per hour or $606.40 per week.[8] The seasonally adjusted average weekly earnings of all public and private sector employees for May 2012 were $1,057.30.[9]

By comparison, the standard daily allowance for empanelled jurors in the Northern Territory of $60 per day (for trials of 9 days or less) is equivalent to $300 per week. In other words, it is less than half of the weekly minimum wage. If the trial lasts 10 days or longer the jury fee of $120 per day is equivalent to $600 per week, which is only marginally less than the weekly minimum wage.

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[4] See also Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) at [12.4]
[5] *Fair Work Act 2009* (Cth), s 111(1)(b)
[6] Manufacturing and Associated Industries and Occupations Award 2010, cl43.2(a)
[7] Manufacturing and Associated Industries and Occupations Award 2010, cl 43.2(b)
[8] http://www.fairwork.gov.au/pay/national-minimum-wage/pages/default.aspx (as at 4 September 2012)
[9] http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0 (as at 4 September 2012)

Comparison with Other Australian Jurisdictions

Like the Northern Territory, juror's fees and fares in each Australian jurisdiction are stipulated by regulations to the relevant jury Act. Each regime is different. The allowances as at 1 February 2011 are conveniently summarised in the report of the Queensland Law Reform Commission (QLRC) entitled, *A review of Jury Selection*,[10] and therefore will not be repeated here.

Suffice to say that in comparison with other Australian jurisdictions, the remuneration of jurors in criminal trials in the Northern Territory is at the lower end of the scale, particularly for trials lasting 9 days or less. In New South Wales, for example, the daily fee for attendance for 10 days or less is $104.75, regardless of whether the juror is employed. For trials lasting more than 10 days, the fee for unemployed jurors remains at $104.75, and the fee for employed jurors increases to $235.65 per day to reflect, one assumes, the effect of the *Fair Work Act 2009* (Cth) discussed above [11]. In South Australia, only a nominal amount of $20 is paid if no loss or expenditure in excess of $20 was incurred, otherwise, the maximum daily rate before empanelment is $137 and after empanelment is $247.[12]

Further, the Northern Territory travel allowance of 27 cents per kilometre (for those who have no access to public transit) is also at the lower end of the scale. In New South Wales a sliding scale is used: for a journey of not more than 14km, $4.30 each way; for a journey of more than 14km but less than 100km, 30.70 cents per km each way; for a journey of 100km or more, $30.70 each way.[13] In South Australia, a flat rate of 66 cents per km travelled (for a minimum of 12km) is provided.[14]

The Committee's View

Juror Fees

[10] Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68 2011) at [12.26]-[12.57]
[11] Jury Regulations 2010 (NSW), Sch 1.
[12] Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) at [12.38]-[12.39]. The amounts quoted are as at 21 February 2011: ibid at n 1790
[13] Jury Regulations 2010 (NSW), Sch 1.
[14] Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) at [12.38]

It is clear from the preceding discussion that the categories of people that are most likely to be financially disadvantaged by sitting on a jury are casual employees, employees serving on a trial of more than 10 days duration, and people who are self-employed. [15] It makes sense, therefore, to distinguish between jurors based on their employment status, for example, as the Juries Regulations (NT) reg 8(1) currently does.

Further, in the Committee's view a mechanism should be put in place whereby the rate of remuneration for jurors in a criminal trial can be increased regularly so that its real value is not eroded by inflation. The easiest way of achieving this is to tie fees payable to jurors to the National Minimum Wage. [16] The Committee makes no recommendation regarding the fees payable to jurors in a civil trial because, in the Committee's view, the current fees payable are adequate.

Finally, in the event an employed person loses his or her entitlement to be paid by their employer, the fee for jury service for these individuals should be approximately twice the National Minimum Wage to ensure that the juror does not suffer significant financial disadvantage for fulfilling his or her public duty by serving on a jury.

Travel Allowance

As has been noted above, a juror or potential juror will be reimbursed for the costs of using public transport to attend at a relevant Supreme Court building for jury service or, if no public transport is available, an amount calculated at 27 cents for each kilometre of the journey measured along the shortest practicable road route. [17]

No provision is made for the reimbursement of taxi fares. In Queensland, for example, the Jury Regulation 2007 (Qld), Reg 10, provides that:

[15] See also Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) at [12.57]
[16] Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68 2011) at [12.70]
[17] Juries Regulations (NT), Reg 9

10 (1) A person summoned for jury service is entitled to be reimbursed the amount of public transport fares or, if a bus, train or ferry is not available or cannot reasonably be used, taxi fares, the person properly spends in attending or returning from court.

(2) However, a person who cannot reasonably travel by public transport or taxi and travels by private motor vehicle is entitled to an allowance at the rate of –

(a) for travel by motorbike – 15 cents for each km; or

(b) for travel by another motor vehicle – 38 cents for each km.

In the Committee's view, provision should be made in the Juries Regulations (NT) for reimbursement for taxi fares if:

1. Public transport is not reasonably available or cannot reasonably be used; and
2. A private motor vehicle is not reasonably available or cannot reasonably be used.

Regulation 9 of the Juries Regulations (NT) should be amended accordingly.

The Committee is also of the view that the per kilometre fare of 27 cents should be reviewed given the significantly higher cost of petrol in the Northern Territory compared to other Australian jurisdictions. It is not appropriate for the Committee to recommend a specific fare, however, the Committee's observation that the current fare of 27 cents per kilometre is low, should be noted.

Family Care Expenses

Finally, while not raised specifically by stakeholders, the Committee notes the recommendations of the NSWLRC, [18] QLRC [19] and the Law Reform Commission of Western Australia (LRCWA) [20] that reasonable out of pocket expenses for child care

[18] NSW Law Reform Commission, *Jury Selection* (Report 117, 2007) Rec 62.
[19] Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68 2011) Rec 12-5
[20] Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors,* Final Report

or family care incurred as a consequence of jury service should also be reimbursed. As the QLRC noted, '[o]ne of the grounds on which people commonly seek to be excused from jury service is that they are responsible for the care of dependents'. [21] In view of the QLRC,

> t*he reimbursement of expenses for the care of a family member is essentially an issue of equality. Without provision for jurors to be reimbursed for these expenses, many people will, in practical terms, be precluded from performing jury service.* [22]

The Committee agrees with the views expressed by the NSWLRC, QLRC and LRCWA, and recommends that the Juries Regulations (NT) provide specifically that the Sheriff be given the discretion to pay additional out-of-pocket expenses related to child or family care reasonably incurred by reason of jury duty.

This Committee, having considered the matters and reasoning raised therein, makes the following recommendations.

Recommendation

1. The Juries Regulations (NT), Reg 8, should be amended to provide that a juror, potential juror or reserve juror who does not fall within Reg 8(1) should receive daily fees calculated as follows:

    (a) The minimum daily fee payable should be equal to one-fifth of the weekly National Minimum Wage that applies for the financial year in which the jury service is performed;
    (b) For a juror or reserve juror who loses his or her entitlement to be paid by his or her employer, the fee payable should be equal to two-fifths of the weekly National Minimum Wage that applies for the financial year in which jury service is performed.

[21] Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) at [12.80].
[22] Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) at [12.81].

(c) A juror who is self employed should be paid at the same rate as a juror in employment.

2. The Juries Regulations (NT), Reg 9 should be amended to provide for reimbursement for taxi fares if:

   (a) Public transport is not reasonably available or cannot reasonably be used; and
   (b) A private motor vehicle is not reasonably available or cannot reasonably be used.

3. The Department of Attorney-General and Justice should review the per kilometre fare stipulated in the Juries Regulations (NT), Reg 9(2)(b) given the significantly higher cost of petrol in the Northern Territory compared to other Australian jurisdictions.

4. The Juries Regulations (NT) should be amended to grant discretion to the Sheriff to pay additional out-of-pocket expenses related to child care of family care incurred by reason of jury duty provided such expenses, in the opinion of the Sheriff, are necessarily incurred.

PART II

THE JURY SYSTEM

PART II - THE JURY SYSTEM

It is unnecessary to expound at any great length on the jury system. It is an accepted and integral part of the legal system of every State and Territory of Australia, and of many other countries which have inherited the common law of England. Certainly there are other systems throughout the world where the search for a just and fair resolution of disputes between citizen and citizen or citizen and State, is conducted by procedures somewhat different. Such systems are rather unkindly called “inquisitorial”, an adjective which carried a rather sinister meaning based on past history, but which, these days, means that the judges in such systems take a more active part in the gathering and presentation of evidence than would be permitted by Australian judges; and would, indeed, be grounds for disqualification if any attempted it.

No suggestion is made here that one system is superior to the other. The variations of legal procedures reflect a balancing of traditions and studies acceptable to a specification.

The relevance in this Report is merely to emphasise that the jury system is firmly embedded in Australia, and is accepted as such by the vast majority of Australian citizens; which includes this Committee.

For this reason, no recommendation is put forward directed to the abolition of the jury and its replacement by some other system. The practical view is taken that any such recommendation would be regarded as irrelevant, unnecessary and offensive to most Australian citizens.

In comparatively recent times there has been one significant change to jury deliberations. That change has now been recognised in all states and territories in

Australia and allows a jury to reach a verdict by majority decision; although the majority must be a significant majority.

It should also be noted that 4 states and territories in this country now permit trial of an indictable offense by judge alone:

NSW - Criminal Procedure Act – 2.132

Qld - Criminal Code – s.604

WA - Criminal Procedure Act – s.118

ACT - Supreme Court Act – s.68B

This legislation does not take away from the defendant the right to trial by jury because it provides that trial by judge alone will only be granted, either, on the application of the defendant or, if the prosecution makes such an application, only with the consent of the defendant; and, in either case, the judge has a discretion to grant or refuse the application.

Likewise, the present age has seen a considerable reduction in the number of trials with juries in civil matters. This is particularly marked in the two most populated States of NSW and Victoria where, up until about 30 years ago, large numbers of cases of trial by civil juries appeared regularly in the lists, concerned basically with claims for damages for injuries arising out of vehicle collisions or industrial accidents. Such matters are now severely curtailed and trials with civil juries are infrequent. This does not suggest that they are entirely abolished or that they will not revive if circumstances dictate that the viewpoint of wisdom of the ordinary citizen should be consulted.

No such changes appear in criminal law and the jury remains the ultimate finder of fact, and guilt or innocence in all indictable matters.

For the above reasons, this Committee does not countenance any suggestion for abolition of juries, particularly juries in criminal trials.

ABORIGINAL REPRESENTATION ON JURIES

The history of the Supreme Court of the Northern Territory has recently been written by Mildren J in the book *"Big Boss Fella – All Same Judge"*.

At pp 178-9 His Honour refers to the legislation and regulations whereby Aboriginals, originally excluded from jury service, became, from 1962 onwards, as fully entitled as any other citizens to vote and serve on juries. His Honour then comments:

> *"One might have expected these changes to bring forth a large number of Aborigines in the jury panels summonsed for jury duty, but this has not proved to be the case. The reasons for this may be explained, first, in large part by the fact that juries are selected only from jury districts. There are only two such districts, one in and around Darwin and the other in and around Alice Springs. Whilst there are many Aboriginal people living in both of these places, they are not all necessarily enrolled within those districts. Secondly, people who have committed offences and been sentenced to a term of imprisonment are not qualified for jury service for a period of seven years after the sentence has been completed. Sadly, this would disqualify many Aborigines. Thirdly, a person who is unable to speak, read and write English is not qualified for jury duty. This would rule out many more. Even when several Aboriginal jurors are in the panel, they are usually challenged peremptorily by the accused's counsel whenever the accused is an Aborigine. I believe that the reason for this lies in the fact that, even if the accused does not know the potential juror personally, he or she believes that the potential juror is likely to know all about them through the Aboriginal "bush telegraph".*

Similarly, Russell Goldflam, in his article *"White Elephant in the Room – Juries, Jury Arrays and Race"* gives a number of reasons to explain the lack of representation of Aboriginals on juries as including:

- disqualification due to prior convictions:
- lack of understanding of the English language;
- lack of understanding of proceedings;
- fear of some Aboriginal jurors that, in hearing a case against an Aboriginal defendant, they might cross some cultural or relationship boundary which their traditional heritage forbids them to cross.

It is fair to say that the very real problems that Goldflam mentions exist in Alice Springs and would no doubt exist to some extent, some other parts of the Territory if a jury district was proclaimed there. They do not exist to the same extent in Darwin.

This is because in Darwin the Aboriginal population is more integrated with the community, many of them with parents or ancestors of European, Asian or Filipino origin.

It was not always so. Professor Powell in his monumental work *"Far Country"* commented on the European occupation of Darwin that, "Perhaps the saddest fate of all befell a people who were consistently friendly to Europeans and never suffered massacre at their hands, the Larrakia of Darwin". The "saddest fate" was dispossession and degradation. Their survival, over a century of intolerance, is an inspiring story and they have become an integral part of the Darwin scene and by preserving that consistent friendliness which Professor Powell mentions, have contributed greatly to the racial harmony which exists in Darwin today.

In Alice Springs, however some of the Aboriginal population is more alienated from the rest of the community; and likewise has a floating population of visitors from

outside whose primary connection is with the community from which they have come and to which they ultimately return.

Some of the problems mentioned by Russell Goldflam and also by the Full Court in Woods can be, at least partially, remedied by amendments to the Juries Act and Regulations; and by further powers and discretion given to the Sheriff as to service of jury summonses and transportation of jurors from areas not close to Alice Springs though still within the Alice Springs District.

To this end, the recommendations set out in Part I are devised to broaden the scope of available jurors and make it more convenient for them to attend.

Insofar as the proposed amendments to the Juries Act are concerned, they will, of course, apply to all citizens; but it is basically to the Aboriginal population that the amendments are directed, in the hope and expectation that a greater number of Aboriginals will become qualified for jury service.

But it must be stressed that the proposed amendments are procedural, that is, they are designed to enhance and enlarge the operation of the Act, but do not and cannot deal with the substantive question of unequal Aboriginal representation on juries proportionate to their numbers. In effect the number of Aboriginals qualified to serve on juries in the Alice Springs District will be increased; but not greatly. The basic problems of lack of understanding of the process, lack of English language skills, and traditional reluctance to enter unfamiliar and possibly hazardous or dangerous territory, remain.

That is not to denigrate the amendments proposed to the Juries Act. They should, it is hoped, generally broaden the operation and increase the efficiency of the Act.

Insofar as they will also, to a limited extent, increase the number of Aboriginals qualified for jury service, they are a step forward; but a small one.

No Immediate Solution

This Committee has considered various proposals or suggestions designed to ameliorate what is clearly an affront to the principle "equality before the law", a principle accepted as basic to this nation; the more so when translated into equally basic Australian such as "mateship" and "fair go".

Undoubtedly, therefore, the under-representation of Aboriginals in jury service in the Northern Territory must be remedied; but this Committee now emphasises something it will emphasise again that, THERE IS NO IMMEDIATE SOLUTION. There is no magic wand to be waved, no miraculous incantation to be pronounced, and no voice from on high proclaiming "let there be light – and there was light". One must descend into the harsh world of reality and practicality; and that points inevitably to the obvious and comprehensive but long-term solution; education. This is not merely the view of this Committee; it is a view equally and strongly shared by such Aboriginal leaders and other persons familiar with Aboriginal affairs whom the sub-committee consulted.

There was, in fact, a very strong endorsement by Aboriginal leaders in Alice Springs of the suggestion that they would speak to the various Aboriginal communities in the District to emphasise the privilege and obligations of jury service and to familiarise them with the procedures. This is not to suggest that such leaders are not already doing this, but rather to advise on a more concerted and organised approach to encompass all communities.

This step can be taken almost immediately and this Committee recommends that the Department of the Attorney-General and Justice confer with Aboriginal leaders on ways and means to consult with Aboriginal communities on a regular basis, to enhance knowledge and comprehension of jury service.

In line with this, it would be appropriate to ask Aboriginal communities to nominate representatives to observe jury trials in action and report back to their communities. Such representatives should be given a special place in court and a person nominated by the court to answer questions and explain procedures. The

representatives should not be allowed to interview jurors or intimate by word or gesture what they feel the jury should do. Their value would be as neutral observers. It would assist if, at the commencement of a trial, the presiding judge would welcome them and explain to them and to the jury that they were observers and in no way part of the trial itself.

It remains, however, that the ultimate aim must be education. This Committee does not suggest that the Department of Education and Children's Services is failing in the difficult task of providing schooling for remote communities. It does however ask that emphasis or greater emphasis, be employed at the primary school level to explain in simple terms the system of trial by jury. But that is just one step in the education process.

This Committee fully appreciates that, in recommending education in the broad sense as being the ultimate, and indeed, the only practical answer to the problem of underepreseantion of Aboriginals on juries in the Northern Territory, it may be exceeding the terms of reference given to it. But, it also notes that the Terms of Reference refer to the decision of the Full Court in Woods, where the question of Aboriginal representation in juries was examined in some detail by their honours. Strictly, the Terms of Reference can be met by recommending education in the theory and practice of jury procedure; but obviously this cannot be understood without the underpinning of a broader educational background. In other words, education in this particular is only part of the necessary and more general picture.

It may be tiresome and boring to state the obvious. But it must be stated as often as it takes to become embedded in the philosophy of government and automatically accepted by its citizens, that education is the ultimate solution to bring Aboriginal communities into equality with their fellow citizens. It will not be an easy task, and will involve far more patient plodding and repetition than spectacular gestures of fleeting and dubious value.

In fact this Committee understands, and records its understanding, that the task will be appallingly difficult. One has only to read *"Little Children are Sacred"*, the Report of the NT Board of Inquiry into "The Protection of Aboriginal Children from Sexual

Abuse" to comprehend the vast extent of disorder in various Aboriginal communities. To that add the excellent and well-researched paper (and by its very excellence the more depressing), *"Law and Disorder in Aboriginal Communities"* by Richard Coates the highly experienced and respected Director of Public Prosecutions of the Northern Territory, which describes in drastic, but realistic terms, the high level of violence, particularly domestic violence, in these communities.

Richard Coates, former Director of Public Proseuctions and the authors of *"Little Children are Sacred"* see education as the only way forward; but the extent of the task can be appreciated by this quotation from Richard Coates paper:

> *"Although both the Territory and Commonwealth Governments have significantly increased the level of funding for Aboriginal education, the outcomes are getting worse. It is all too common for we lawyers to ask Aboriginal parents to interpret for their children".*

He then quotes from the *"Little Children are Sacred"* Report:-

> *"if there is any hope for any future for Aboriginal people, education is vital. There is a link between education (or lack of it) and manifestations of a disordered society".*

To that should be added another passage from the *"Little Children are Sacred"* Report (at page 18):-

> *"We are utterly convinced that education (that properly addresses the needs of the local community) provides the path to success. We have been dismayed at the miserable school attendance rates for Aboriginal children and*

the apparent complacency here (and elsewhere in Australia) with that situation".

The authors of that Report then state:

"This leads to our first recommendation. The government must lead. There is an opportunity to start something which can have a hugely positive impact on the whole of Australia".

This Committee recognises that education for jury service is only one part of the comprehensive task of bringing education into communities to equip them to take their place as contributing citizens in a growing and vigorous Territory society.

Extraordinarily difficult as the task may be, the alternative is total disaster; a growing population of violent and uncontrollable groups of peoples useless to themselves and to the society in which they live, while demanding from that society the means of subsistence.

This Committee recognises that far greater resources and personnel will need to be directed to this end. Teachers are known to be dedicated to their profession, but dedication is not enough without understanding of a particular community and the preparedness to spend several lonely years with them. In many cases he or she will find parents who do not care whether their children attend school or wish to encourage them to do so.

The Territory needs informed citizens to match the development of the Territory in pace with the development of the Nation and for the Territory, to Statehood.

No one can reasonably suggest that Aboriginal children are less intelligent or less capable of learning than other children. There are too many examples of Aboriginals prominent in the Territory. The problem is rather one of "atmosphere" in particular groups where the children are not encouraged to learn or develop beyond the primary stage of schooling. The lead must come from the Aboriginals themselves and this Committee welcomes the work already done by Aboriginal leaders and their determination to continue that work.

In practical terms, there is a vast potential of good and useful citizens to the Territory in Aboriginal children growing up in the Territory and it would be unjust to them and to us to fail.

PATHS NOT FOLLOWED

(a) de mediate linguae

de mediate linguae - this was a practice developed by the common law in England, where a "minority defendant had the right to be tried by a jury comprised half of foreigners". The practice applied to both civil and criminal law, but seems to have had commercial significance in granting foreign merchants the right to a jury of which half was composed of persons of the nationality of the foreign firm. (See Brennan – Industrial Journal of Criminology – 2007 at p.14).

The practice was known in Australia but apparently not applied. Paul Mullally QC, formerly Judge Mullally of the Victorian County Court, in his book *"Crime in the Port Phillip District 1835-51"* refers to two cases in criminal trials where an application was made for a jury de mediate linguae; the first for an Aboriginal from Van Diemen's Land (and therefore, according to his counsel Redmond Barry, a "foreigner" to the local (NSW) Jurisdiction); The second a Frenchman. It may have been optimistic to hope that 6 Vandemonians or 6 Frenchmen could have been found in the sparse population of Port Phillip in the 1840's, but in both cases the application was not granted and, in the second case, which had been referred to Sydney, the Sydney judges held that there was no right to such a jury in the Colony. (Mullaly pp106-7).

The right to trial de mediate linguae was abolished in England in 1870 (Naturalisation Act) and has been specifically abolished in all Australian States and Territories. S.65 of the NT Juries Act provides that *"Special juries and juries de mediate linguae are abolished".*

There seems to be no call to re-introduce such a system into any part of Australia. If it were applied across the board the immense variety of immigrants to Australia would cause chaos. A great number of criminal trials would be delayed while search was made for jurors of the appropriate nationality; and how could one deal with nations of sparse population? How many citizens of Tuvalu, Nauru or Monaco could one find in the District? Confining it to Aboriginals would cause difficulties of defining "Aboriginal" and would tend to "isolate" Aboriginals.

In any event, no-one whom this Committee has interviewed has advocated the adoption of the system.

A version of "de mediate linguae" was proposed by the "Review of the Criminal Courts of England & Wales (Auld L.J.) and by the 1993 Runciman Royal Commission on Criminal Justice. In neither case were the proposals adopted. For the reasons given above this Committee considers that the proposals were rightly rejected.

(b) **Proportionate Representation**

Another suggestion, somewhat in line with de mediate linguae but rather broader in scope, is to select juries having in their number the same proportion of jurors of the particular race represented by the defendant as that proportion exists in the community.

The Full Court in Woods examined earlier judicial decisions in which submissions to this effect were made, and concluded that such decisions did not uphold any such principle. The Full Court commented:

"We respectfully agree with the principles expressed in these authorities. They show that an accused person is not entitled to be

tried by a jury that is racially balanced or comprised of the same proportion of people of a particular race, as occurs in the broader community from which the jury is selected. Instead, they show that an accused person is entitled to be tried by an independent and impartial jury selected in accordance with the law. In essence, in this case, that means an accused person is entitled to be tried by a jury of 12 persons who are randomly selected in accordance with the Act from a jury array that is itself randomly selected from the local community.

To impose some overriding requirement to the effect that a jury, once randomly selected in this way, has to be racially balanced or proportionate would be the antithesis of an impartially selected jury, not to mention the enormous practical difficulties that would be associated with attempting to meet such a requirement, particularly as it is not an easy matter to identify who is, or is not, a member of a particular racial group".

The US Supreme Court has, at times applied the sixth amendment ("fair and speedy public trial by jury") at the earlier stage of selection of the Panel, to ensure impartiality of selection if a significant group does not appear to be fairly represented. But this does not mean selection based on proportionality of any particular group.

RECOMMENDATIONS

Recommendation 1

(c) Amend s.27 by adding at the end of the section, as now appearing, the following sentence:

> *"The Sheriff shall then send the list of those persons so chosen to a prescribed agency to determine whether any of such persons are not qualified pursuant to s.10 and, if any such appear, omit the names of such persons from the jury list".*

(d) Prescribed agency shall be as prescribed in the Regulations.

Recommendation 2

That s.27A of the NT Juries Act be amended in the following manner:

> *That in subsections (3) and (4) of s.27A, in lieu of the words "is able to read, write and speak the English language", the words "able to understand and communicate in the English language". And in subsection (4) in lieu of the words "able to read, write and speak the English language" there be inserted the words "able to understand and communicate in the English language, or if for any other reason the Sheriff or Deputy Sheriff is concerned that a juror may be unfit to properly perform service as a juror".*

(s.15 then leaves, as before, the ultimate decision to the Judge or Master).

Recommendation 3

That s.27A of the NT Juries Act be amended in the following manner:

That in subsections (3) and (4) of s.27A, in lieu of the words "is able to read, write and speak the English language", the words "able to understand and communicate in the English language". And in subsection (4) in lieu of the words "able to read, write and speak the English language" there be inserted the words "able to understand and communicate in the English language, or if for any other reason the Sheriff or Deputy Sheriff is concerned that a juror may be unfit to properly perform service as a juror".

(s.15 then leaves, as before, the ultimate decision to the Judge or Master).

Recommendation 4

(a) That s.43 of the NT *Juries Act* be repealed.

(b) That, in s.44(1)(a) of the *Juries Act*, the expression "capital offence" be deleted and the words "an offence for which the punishment is mandatory imprisonment for life" be substituted.

(c) At the end of s.44(1) there be added these words "but pursuant to section 44(1)(b) there is more than 1 accused, the Crown is limited to 12 peremptory challenges overall, while each accused remains entitled to 6 individual peremptory challenges. Similarly to section 44(1)(a) in a cases where there are more than 1 accused, the Crown is limited to a total of 24 peremptory challenges overall, while each accused remains entitled individually to 12 peremptory challenges.

Recommendation 5

That s.356 of the NT Criminal Code be repealed and, in lieu thereof the following section be enacted:

"356 Ascertainment of facts as to challenge

If, at any time it becomes necessary to ascertain the truth of any matter alleged as cause for challenge, the fact shall be tried by the trial judge who may then on the facts as found by him, and upon hearing such submissions as may be put to him by prosecution or defence, determine whether the person challenged should or should not be

impanelled and no appeal shall lie from the Judges' decision on this matter".

Recommendation 6

That to s.356 of the NT Criminal Code there be added the following section:

"356A

The judge presiding at the trial of any criminal proceedings may discharge the jury that has been selected if, in the opinion of that judge, the exercise of the rights to make peremptory challenges has resulted in a jury whose composition is such that the trial might be or might appear to be unfair".

Recommendation 7

Amend subsection (b) of s.30 to include at the end of the subsection, the word "or"'

Add subsection (c):

(c) If it appears to the Sheriff that, in the case of any particular juror, some method of service, other than as set out in sub-section (a) or (b), may be more effective in bringing the summons to the notice of the juror, the Sheriff may select such other means of service as are provided for in the Regulations.

(Regulations may then refer to email, etc)

Regulations may also provide that the Sheriff may confer with an Aboriginal Legal Service as to appropriate methods of communicating with Aboriginal persons, unfamiliar with jury procedure.

Recommendation 8

”That the ‘Catchment Pool’ of the Jury List be expanded by adding to the Electoral Roll names taken from Centrelink and Motor Vehicle Registry databases, and that, in this process it would be useful to refer to the procedure employed by the NSW Electoral Commission.

Recommendation 9

That the Jury Districts for Darwin and Alice Springs be widened so as far as practicable, to allow further representation from Indigenous communities.

Recommendation 10

If public or private transport is not reasonably available or cannot reasonably be used, the Sheriff should, if necessary, make arrangements to assist people to attend court when summoned for jury service and should meet the costs of those arrangements.

Recommendation 11

If a person is selected to serve as a juror in a case which requires more than one day’s hearing, and if it is impracticable for such juror to travel daily from his home, the Sheriff should arrange suitable accommodation at no expense to the juror, for the juror in the city where the trial is being held.

Recommendation 12

That sections 351A, 352, 353, 354, 356, 358 and 359 of the NT *Criminal Code* be repealed and that the NT *Juries Act* be amended by the insertion of these sections into the NT *Juries Act* as sections 42A-G respectively.

Recommendation 13

That the *Juries Act* NT include a Preamble emphasising:

(d) The importance of jurors as representing the community;

(e) The aim to spread the obligation of jury service equitably among the community;
(f) To permit the timely development of new technologies for the more equitable selection of persons for jury service.

Recommendation 14

The *Juries Act* (NT) should be amended to provide an express power to discharge a juror without discharging the whole jury in circumstance where the court is satisfied that:

(c) The juror:
(vii) Is either disqualified or exempt from jury service;
(viii) Is, by reason of illness, unable to continue to serve as a juror;
(ix) Displays a lack of impartiality;
(x) Refuses to take part in deliberations;
(xi) Has engaged in misconduct in relation to the trial; or
(xii) Should not be required to continue to serve for any other reason that the judge considers sufficient; and

(d) The interests of justice do not require that the whole jury be discharged.

and to order that the trial continue with the remaining jurors, so long as the number of remaining jurors meet the requirements of the *Juries Act* (NT) s.37 (criminal cases), and s.39 (civil cases).

Recommendation 15

5. The Juries Regulations (NT), Reg 8, should be amended to provide that a juror, potential juror or reserve juror who does not fall within Reg 8(1) should receive daily fees calculated as follows:

(d) The minimum daily fee payable should be equal to one-fifth of the weekly National Minimum Wage that applies for the financial year in which the jury service is performed;
(e) For a juror or reserve juror who loses his or her entitlement to be paid by his or her employer, the fee payable should be equal to two-fifths of the

weekly National Minimum Wage that applies for the financial year in which jury service is performed.

(f) A juror who is self employed should be paid at the same rate as a juror in employment.

6. The Juries Regulations (NT), Reg 9 should be amended to provide for reimbursement for taxi fares if:

(c) Public transport is not reasonably available or cannot reasonably be used; and

(d) A private motor vehicle is not reasonably available or cannot reasonably be used.

7. The Department of Attorney-General and Justice should review the per kilometre fare stipulated in the Juries Regulations (NT), Reg 9(2)(b) given the significantly higher cost of petrol in the Northern Territory compared to other Australian jurisdictions.

8. The Juries Regulations (NT) should be amended to grant discretion to the Sheriff to pay additional out-of-pocket expenses related to child care of family care incurred by reason of jury duty provided such expenses, in the opinion of the Sheriff, are necessarily incurred.

Recommendation16

That the Government of the Northern Territory (seeking also the aid and cooperation of the Commonwealth), give most urgent and increased attention to the subject of education in Aboriginal communities.

Recommendation 17

That Aboriginal leaders in the Northern Territory be encouraged and assisted to advocate firmly and consistently the advantages of education to Aboriginal communities.

Recommendation 18

That in all primary schools in the Northern Territory, some attention be given to explaining, in simple language, the legal system of the Northern Territory and, in particular, the function of a jury and the obligation of a citizen to serve on juries if requested.

Recommendation 19

That Aboriginal communities in the Alice Springs District be asked to nominate representatives to attend and observe jury trials, and report back to the community on the function and relevance of the jury.

Recommendation 20

The Northern Territory Department of Education and Children's Services should revise the curriculum of primary and secondary schools in the Northern Territory to ensure that greater attention is given to explaining the legal system of the Northern Territory, with a particular emphasis on the function of a jury and the obligation of a citizen to serve on juries if requested.

Recommendation 21

The Northern Territory Department of Attorney-General and Justice should ensure that Aboriginal communities in the Alice Springs District are asked to nominate representatives to attend and observe jury trials and report back to the community on the function and relevance of the jury.

APPENDIX A

OTHER JURISDICTIONS

Tasmania

The Tasmania Juries Act confines to the Court the function of excusing a juror. The Sheriff may apply to the Court for a person to be excused if the Sheriff considers that a person "may not be able to perform jury service". S.13 (Tas).

Western Australia

WA Juries Act s.34G

> *s.34G(2) "If a judge or summoning officer is satisfied that a person who is summoned*
>
> *...(e) does not understand spoken or written English or cannot speak English well enough to be capable of serving effectively as a juror*
>
> *...the judge or summoning officer must excuse the person from the summons".*

(The other subsections in this s.34G deal with personal or physical incapacity).

Hence the "summoning officer" does not need to refer the question of language incapacity to a judge but the subsection quoted is, as in the NT legislation, confined to language incapacity.

South Australia

SA Juries Act

> *s.34 Ineligibility for jury*
>
> *"A person is ineligible for jury service if he or she –*
>
> *(b) has insufficient command of the English language to enable him or her properly to carry out the duties of a juror".*

There does not seem any provision for the Sheriff to refer such a question to the judge and apparently it can only be raised on challenge:

> *s.66 "A juror may be challenged on the ground that he or she is ineligible to act, or disqualified from acting as a juror and, if the court is satisfied of the ineligibility or disqualification, the juror must be discharged".*

(This would seem a somewhat late stage to discover ineligibility and one assumes that provision is made in the rules pursuant to the rule-making power in s.89.)

But note again that the ineligibility is confined to language capacity.

New South Wales

Jury Act s.38

> *s.38(1) "A person may be excused for good cause from attending a court or coronial inquest in pursuance of a summons:*
>
> *(a) by the Sheriff at any time before the day on which the person's attendance is required or on that day at any time before the commencement of the trial or inquest at which the person may be selected as a juror, or*
>
> *(b) by that court or the coroner holding that inquest, at any time on or after that day, notwithstanding that the Sheriff did not excuse the person for that cause".*

The expression "for good cause" is clearly not confined to language incapacity and has a very broad scope. The initial decision may be made by the Sheriff which would seem to be final unless the juror in question takes it further to the judge.

Victoria

Juries Act s.12

> *"Court may determine that a person not perform Jury service*
>
> *12. Court may determine that a person not perform jury service*

(1) If a court thinks it is just and reasonable to do so, the court may, on its own motion, or on an application under subsection (2), order that a person not perform jury service –

(a) for the whole or part of the jury service period; or

(b) for a longer period specified by the court; or

(c) permanently

(2) If the Juries Commissioner considers that a person may not be able to perform the duties of a juror, the Juries Commissioner may apply to a court for an order under subsection (1)".

The expressions *"may not be able to perform the duties of a juror"* and *"the court thinks it is just and reasonable to do so,"* would seem to cover, inter alia, language incapacity, but go further.

Queensland

Queensland Juries Act

"13 – Ineligibility for jury

A person is ineligible for jury service if he or she –

(a) Is mentally or physically unfit to carry out the duties of a juror; or

(b) Has insufficient command of the English language to enable him or her properly to carry out the duties of a juror; or

(c) Is one of those persons declared by Schedule 3 to be ineligible for jury service".

Subsections (a) and (c) relate to physical or mental unfitness or categories of an official or professional nature the holders of which are excused from jury service. Otherwise subsection (b) confines incapacity to language.